

GARY



**The Comptroller General  
of the United States**

Washington, D.C. 20548

## Decision

**Matter of:** East West Research, Inc.

**File:** B-235031; B-235032

**Date:** July 6, 1989

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### DIGEST

Protests that agency improperly evaluated items offered in response to request for quotations are dismissed as untimely where protester, in one case, did not file a timely agency-level protest and, in the other case, did not file a protest with the General Accounting Office within 10 working days after learning of denial of its agency-level protest.

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### DECISION

East West Research, Inc., protests the award of purchase orders to United States Safety Service Company and D&D Packaging Co., Inc., by the Defense Logistics Agency (DLA), under request for quotations (RFQ) Nos. DLA400-88-Q-GD92 (RFQ-1) and DLA400-89-T-S500 (RFQ-2), respectively. The RFQs, issued pursuant to small purchase procedures, sought quotations to provide industrial spectacles for the Defense General Supply Center. East West asserts that DLA conducted improper technical evaluations of the quotations submitted in response to the RFQs. We dismiss the protests as untimely.

RFQ-1 was issued on March 14, 1988. It solicited quotations for 12,190 pairs of industrial spectacles, National Stock Number (NSN) 4240-01-140-0282, more specifically described by reference to the "Norton Co. Safety Products Div. FSCM 79250, P/N 18000," and the "UVEX Winter Optical Inc. FSCM 08895, P/N 9000C." The RFQ further stated that the items must meet the requirements of American National Safety Institute (ANSI) standard Z87.1, "Practice for Occupational and Educational Eye and Face Protection," and requested that quotations be submitted by March 30. Of seven quotations submitted, four, including East West's quote on spectacles designated "Sellstrom P/N 79003," were for other than the models specified in the RFQ. DLA evaluated the alternate items and found two of them technically

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acceptable, including a product offered by U.S. Safety, the low, technically acceptable offeror, to whom it issued a purchase order on May 25. However, DLA found the Sellstrom spectacles offered by East West to be technically unacceptable because they lacked the wraparound design and the strength features of the items specified in the RFQ and required by the agency.

By letter dated May 17, DLA advised East West of its finding that its item was unacceptable. On December 19, almost 7 months after issuance of the purchase order, East West filed a protest with the agency. In denying the protest on December 28, DLA reiterated the bases for its findings of technical unacceptability and enclosed a copy of its May 17 letter.<sup>1/</sup> East West filed a protest with this Office on March 27, 1989, 3 months after its agency-level protest had been denied.

RFQ-2, issued on August 9, 1988, solicited quotations for 1,085 pairs of industrial spectacles, NSN 4240-01-227-4397, with reference to "Siebe North, Inc. FSCM 91019, P/N 18020." The RFQ stated that the spectacles must meet the performance requirements of ANSI standard Z87.1, and requested the return of quotations by August 30. Of the eight quotations submitted, three were for alternate items. East West offered another Sellstrom product, P/N 79073. According to DLA, it sent letters in mid-December advising East West and two other offerors that their alternate items had been found technically unacceptable. Concerning the item offered by East West, the agency reports that it notified the firm that the Sellstrom spectacles were technically unacceptable because they lacked the required wraparound design and vented side shields. On January 2, 1989, DLA issued a purchase order to D&D, the low, technically acceptable offeror, for the Siebe North product specified in the RFQ. More than 3 months later, on March 16, East West filed a protest of the acquisition with the agency and, on March 27, with our Office.

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<sup>1/</sup> In February 1989 the agency undertook further technical reviews of the Sellstrom product, and of a similar Sellstrom item offered by East West in response to RFQ-2 (discussed below), but only with regard to possible technical acceptability for future acquisitions; purchase orders already had been issued under both RFQs at issue here. On March 21, 1989, the agency advised East West that both Sellstrom items were technically unacceptable as alternates to the spectacles designated as NSN items.

Under our Bid Protest Regulations, a protest must be filed either with the contracting agency or our Office not later than 10 working days after the basis for protest is known or should have been known, whichever is earlier. 4 C.F.R. § 21.2(a)(2) (1988). Where, as here, a protest is first filed with the contracting agency, a subsequent protest to our Office will be considered timely if it is filed within 10 working days of the date the protester learns of initial adverse agency action on the agency-level protest, but only if the initial protest to the agency was timely. 4 C.F.R. § 21.2(a)(3). The fact that the agency considers an untimely protest on the merits does not alter this result; our timeliness regulations may not be waived by action or inaction on the part of the contracting agency. Hooven Allison, B-224785, Oct. 10, 1986, 86-2 CPD ¶ 423.

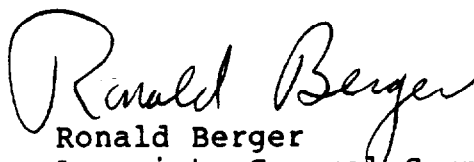
As noted above, East West did not file a protest with our Office concerning RFQ-1 until March 27, 1989, 3 months after its agency-level protest had been denied (and almost 7 months after issuance of a purchase order under the RFQ to a competitor). Although East West, in its comments on the agency's administrative report, suggests that it did not receive the May 17, 1988 letter from DLA advising it of the reasons its alternate item was found unacceptable, the protester does not deny having received the agency's letter of December 28, 1988, in which DLA denied the agency-level protest and enclosed another copy of the May 17 letter. Since East West waited until March 27, 1989 to file a protest with our Office, a period of 3 months after its agency-level protest was denied, its protest clearly is untimely.

With regard to RFQ-2, East West did not file its agency-level protest until 4 months after the agency states that it sent a notice of technical unacceptability to the firm, and more than 3 months after a purchase order was issued to a competitor. In its comments on the agency's report, East West does not deny having received DLA's letter of mid-December 1988, advising it of the reasons its alternate item was unacceptable; nor does it provide any explanation of why it waited so long to protest either that determination or the issuance of a purchase order to another firm on January 2, 1989. Since our Regulations, as noted above, require that a protest be filed with the agency or with our Office within 10 days of the date the basis of protest was known or should have been known, East West's March 16 protest to the agency clearly was untimely. As a result, notwithstanding the fact that DLA considered the untimely protest on its merits, East West's March 27 protest to our

Office is also untimely. D. Moody & Co., Inc., B-227596, July 20, 1987, 87-2 CPD ¶ 70; Hooven Allison, B-224785, supra.

We point out, for the protester's information, that based on the record before us, we would conclude that the agency acted reasonably in rejecting East West's offered spectacles. The agency has explained that, contrary to East West's position, industrial spectacles of the type specified in the RFQs are designed for full-time daily use as protective eyewear for workers, as distinct from the Sellstrom spectacles offered by East West, which are intended for disposal after one use by casual visitors, who are not working close to hazardous materials on a daily basis. Industrial spectacles intended for daily use, according to DLA, have a wraparound design, with side vents for ventilation, intended to reduce to a minimum the likelihood that objects can reach the wearer's eyes. The Sellstrom visitors' spectacles, on the other hand, do not have the wraparound design that closely follows the contours of the wearer's face, but simply have side shields attached to the earpieces that leave more room for objects to enter, and thus provide less protection. Further, while the specified (daily use) spectacles must be scratch resistant, DLA reports that the Sellstrom spectacles offered by East West were able to be scratched with a fingernail. Finally, DLA points out that the items offered by East West, based on the manufacturer's own description, clearly did not comply with the required ANSI standard; the Sellstrom catalog described the offered items as "lightweight, comfortable protection for visitors passing through hazardous areas," and the label on the bag containing one of the Sellstrom items submitted by East West for technical evaluation warned that the enclosed eyewear did not conform to ANSI Z87.1 standards, was intended for use only by plant visitors, and should be disposed of after one use. East West, while disagreeing with DLA's position, has not shown it to be erroneous.

The protests are dismissed.

  
Ronald Berger  
Associate General Counsel